Re Liow Fong Mooi; ex p Malayan Banking Bhd

HIGH COURT (IPOH) — BANKRUPTCY NO 29–791 OF 1996
CLEMENT SKINNER JC
27 JANUARY 2000

Bankruptcy *— Creditors' petition — Misstatement as to date of act of bankruptcy — Whether merely irregularity and did not go to substance of complaint — No substantial injustice to judgment debtor — Whether amendment to bankruptcy petition should be allowed — Bankruptcy Act 1967 s 131*

Civil Procedure *— Affidavits — Defective jurat — Name of deponent not stated — Identity of deponent obvious — Whether omission goes to form and not substance — Whether proceedings invalidated*

On 19 November 1996, the judgment creditor served a bankruptcy notice on the judgment debtor. The last day to comply with that notice fell on 26 November 1996. On 11 December 1997, the judgment creditor presented a bankruptcy petition against the judgment debtor in which it was stated that the act of bankruptcy was committed on 27 November 1996. The application to set aside the bankruptcy notice was not heard and determined until 19 August 1997 on which date it was withdrawn by the judgment debtor. Both counsels agreed that as the judgment debtor had not complied with the bankruptcy notice, she had committed an act of bankruptcy and that the bankruptcy petition should have stated that the act of bankruptcy had occurred on 19 August 1997 and not on 27 November 1996. The senior assistant registrar dismissed the judgment debtor's application to set aside the bankruptcy petition. The judgment debtor's appealed. It was argued that: (i) the affidavit verifying the petition contained a defective jurat because the name of the deponent was not stated therein; and (ii) the misstatement of the date of the act of bankruptcy was fatal.

Held, dismissing the appeal with costs:

(1) Apart from a description of the deponent in the jurat, the identity of the deponent was readily ascertainable from other parts of the same affidavit. At best, the omission to state the name of the deponent in the jurat is a defect which goes to form only and not one that goes to the substance of the affidavit and such formal defect would not invalidate the proceedings by virtue of s 131 of the Bankruptcy Act 1967 (see p 150D–E).

(2) The error in stating the date on which the act of bankruptcy took place has an irregularity only, which did not go to the substance of the complaint in the petition. Such mistake would come within the contemplation of s 131 of the Bankruptcy Act 1967. Further, the irregularity had occasioned no substantial injustice to the judgment debtor. There was no dispute, doubt or confusion between the parties as to the date when the act of bankruptcy

occurred, and why it occurred on 19 August 1997 and not on 27 November 1996 as stated in the petition (see p 152A–C); *Re Fadzil bin Othman; ex p Malayan Banking Bhd* [1994] 2 MLJ 474 not followed.

(3) Since the court had already found that the mistake in incorrectly stating the date on which the act of bankruptcy occurred in the petition was an irregularity which did not go to the substance of the petition, it must follow that an amendment necessitated by such mistake would not be one that affect the substance of the petition (see p 153D–E).

(4) The proposed amendment did not seek to introduce a new act of bankruptcy into the petition. The act of bankruptcy relied upon remained the same, ie non-compliance with the bankruptcy notice served on 19 November 1996. What the judgment creditor sought to do by the contemplated amendment was to correct the date on which the act of bankruptcy occurred from 27 November 1996 to 19 August 1997. Accordingly, the amendment was made merely to correctly state the date on which that event happened and to that extent must be regarded as a technical one which did not go to the substance of the petition. Thus, the judgment creditor would not be prevented from amending its bankruptcy petition (see p 154D–F).

[Bahasa Malaysia summary

Pada 19 November 1996, pemiutang penghakiman telah menyerahkan notis kebankrapan ke atas penghutang penghakiman. Tarikh terakhir untuk mematuhi notis tersebut jatuh pada 26 November 1996. Pada 11 Disember 1997, pemiutang penghakiman telah mengemukakan petisyen kebankrapan terhadap penghutang penghakiman di mana adalah dinyatakan bahawa tindakan kebankrapan telah dilakukan pada 27 November 1996. Permohonan untuk mengetepikan notis kebankrapan tidak didengar dan ditentukan sehingga 19 Ogos 1997 di mana pada tarikh tersebut, ia telah ditarikbalik oleh penghutang penghakiman. Kedua-dua peguam bersetuju bahawa oleh kerana penghutang penghakiman tidak mematuhi notis kebankrapan tersebut, beliau telah melakukan tindakan kebankrapan dan petisyen kebankrapan sepatutnya menyatakan bahawa tindakan kebankrapan telah berlaku pada 19 Ogos 1997 dan bukan pada 27 November 1996. Penolong kanan pendaftar telah menolak permohonan penghutang penghakiman untuk mengetepikan petisyen kebankrapan. Penghutang penghakiman telah merayu. Adalah dihujahkan bahawa: (i) affidavit menentusahkan petisyen mengandungi jurat yang defektif kerana nama deponen tidak dinyatakan di dalamnya; dan (ii) salah nyata mengenai tarikh berlakunya tindakan kebankrapan adalah memudaratkan.

Diputuskan, menolak rayuan dengan kos:

(1) Selain daripada gambaran deponen di dalam jurat, identiti deponen dapat ditentukan daripada bahagian lain di dalam affidavit yang sama tersebut. Kegagalan untuk menyatakan nama deponen di dalam jurat hanya suatu kecacatan yang menjejaskan bentuk dan bukannya kepada kandungan affidavit tersebut dan kecacatan sedemikian tidak akan membatalkan prosiding-prosiding menurut s 131 Akta Kebankrapan 1967 (lihat ms 150D–E).

(2) Kesilapan di dalam menyatakan tarikh di mana tindakan kebankrapan berlaku adalah suatu salah aturan sahaja, yang tidak berkaitan dengan asas aduan di dalam petisyen. Kesilapan sedemikian akan terjatuh di bawah maksud s 131 Akta Kebankrapan 1967. Selanjutnya, salah aturan tersebut tidak membangkitkan ketidakadilan yang besar kepada penghutang penghakiman. Tiada pertikaian, keraguan atau kekeliruan antara pihak-pihak berkenaan dengan tarikh tersebut apabila tindakan kebankrapan berlaku dan mengapa ia berlaku pada 19 Ogos 1997 dan bukan pada 27 November 1996 seperti yang dinyatakan di dalam petisyen (lihat ms 152A–C); *Re Fadzil bin Othman; ex p Malayan Banking Bhd* [1994] 2 MLJ 474 tidak diikut.

(3) Oleh kerana mahkamah sudah pun mendapati bahawa kesilapan di dalam menyatakan dengan tidak betul tarikh di mana tindakan kebankrapan berlaku di dalam petisyen adalah suatu salah aturan yang tidak terjumlah kepada dasar petisyen tersebut, ia mesti diikuti bahawa suatu pindaan yang diperlukan di atas kesilapan sedemikian tidak akan menjejaskan dasar petisyen tersebut (lihat ms 153D–E).

(4) Cadangan pindaan tidak bertujuan untuk memperkenalkan suatu tindakan kebankrapan yang baru di dalam petisyen. Tindakan kebankrapan yang digantung harap kekal sama, iaitu ketidak-patuhan dengan notis kebankrapan yang diserahkan pada 19 November 1996. Apa yang pemiutang penghakiman ingin membuat dengan pindaan yang dicadangkan adalah untuk membetulkan tarikh di mana tindakan kebankrapan berlaku dari 27 November 1996 kepada 19 Ogos 1997. Dengan itu, pindaan yang dibuat hanyalah semata-mata untuk membetulkan tarikh di mana kejadian tersebut berlaku dan setakat itu ia mestilah dianggap sebagai sesuatu yang teknikal yang tidak terjumlah kepada dasar petisyen tersebut. Dengan itu, pemiutang penghakiman tidak boleh dihalang daripada meminda petisyen kebankrapan tersebut (lihat ms 154D–F).]

Notes

For a case on misstatement as to date of act of bankruptcy, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 1631.

Cases referred to

A Debtor (No 31 of 1969), Re; ex p the Debtor v Triggs Turner & Co [1970] 1 All ER 920 (refd)

Dunhill, Re; ex p Dunhill (1894) 2 QBD 234 (refd)

Fadzil bin Othman, Re; ex p Malayan Banking Bhd [1994] 2 MLJ 474 (not folld)

Lorrimar, Re; ex p Constable (1890) 62 LT 943 (refd)

Natarajan a/l Kuppusamy, Re; ex p Co-operative Central Bank Ltd (In receivership) [1992] 2 MLJ 468 (refd)

Legislation referred to

Bankruptcy Act 1914 s 109(3) [UK]
Bankruptcy Act 1967 ss 5(1)(c), 93(3), 131
Bankruptcy Rules 1969 rr 95(1), 95(2)

Athithan Singaravelu (*Thevin, Chandran & Wong*) for the judgment debtor.

James Devadason (*Maxwell Kenion Cowdy & Jones*) for the judgment creditor.

Cur Adv Vult

Clement Skinner JC: This is an appeal against the decision of the senior assistant registrar ('the SAR'), dismissing the judgment debtor's application to set aside a bankruptcy petition against her.

On 19 November 1996, the judgment creditor served a bankruptcy notice on the judgment debtor. The last day to comply with that bankruptcy notice fell on 26 November 1996. For reasons explained later, slightly more than a year after the bankruptcy notice was served, the judgment creditor on 11 December 1997 presented a bankruptcy petition against the judgment debtor. In the petition, the judgment creditor stated that the act of bankruptcy relied upon to found the petition was committed on 27 November 1996.

On being served the bankruptcy petition, the judgment debtor filed a notice of intention to oppose the petition and also filed a summons-in-chambers applying to set aside the bankruptcy petition. The SAR heard the application on 17 June 1999 and dismissed it. Hence this appeal.

Before me, Mr Athitan learned counsel for the judgment debtor took two points only.

It was firstly argued that the affidavit verifying the petition contained a defective jurat by reason whereof it should not be read; and if the affidavit was not read, the petition stood unverified and must be set aside.

The affidavit verifying the petition was sworn to by an officer of the judgment creditor, and begins by describing the deponent as Yong Teck Chong, the holder of identity card H0614356. Counsel for the judgment debtor however complains that when the deponent signed the affidavit before the attesting commissioner for oath, the jurat to the

affidavits did not carry or state the name of the deponent. This is how that jurat reads: A

> Sworn by the said ... at Kota Kinabalu

According to counsel, the omission to state the name of the deponent in the jurat would mean that the commissioner for oath had not identified the person who swore the affidavit; and it matters not that the name of the deponent is already stated at the beginning of the affidavit because according to counsel, that part of the affidavit is not being attested to by the commissioner for oaths and so there cannot be a presumption that Yong Teck Chong signed the affidavit. B

I regret I find no merit in this objection. There can be no question or doubt as to the identity of the deponent to the affidavit. Anyone reading the affidavit will see that it begins by describing the deponent as Yong Teck Chong and his signature appears on the affidavit. The fact that the jurat omits to mention his name does not detract from the fact that he did swear the affidavit before a commissioner for oath. There is accordingly no need to presume anything because a court reading an affidavit will not confine itself to only a part of the document but must necessarily look at the whole document and when that is done in the present case, it will be seen that apart from a description of the deponent in the jurat, the identity of the deponent is readily ascertainable from other parts of the same affidavit. At best the omission to state the name of the deponent in the jurat is a defect which goes to form only and not one that goes to the substance of the affidavit. Pursuant to the provisions of s 131 of the Bankruptcy Act 1967 ('the Act') such formal defect would not invalidate these proceedings and I cannot see what substantial injustice has been occasioned to the judgment debtor by such omission and neither has counsel identified any. C D E F

It was next argued that this bankruptcy petition was presented more than six months after the date of the act of bankruptcy relied upon. Section 5(1)(c) of the Act states that the act of bankruptcy relied upon to found a petition must have occurred within six months before the presentation of the bankruptcy petition. However, counsel for the judgment debtor points out that this bankruptcy petition was presented on 11 December 1997 whereas para 4 of the petition states that the act of bankruptcy occurred on 27 November 1996. According to counsel, this petition being presented outside the six months period prescribed in the Act, must be set aside. G

There is a reason why the bankruptcy petition was presented some one year after the alleged act of bankruptcy and there is no dispute between the parties on the facts about to be narrated. When the bankruptcy notice was served on the judgment debtor on 19 November 1996, she did within seven days thereof file an affidavit opposing the same and gave various reasons for so doing in the affidavit. Once such affidavit is filed, r 95(1) of the Bankruptcy Rules 1969 ('the Rules') provides that if shall operate as an application to set aside the bankruptcy notice and r 95(2) goes on to provide that: H I

> If the application cannot be heard before the time specified in the notice for compliance with its requirements, the registrar shall extend the time, and no act of Bankruptcy shall be deemed to have been committed under the Notice until the application has been heard and determined.

The application to set aside the bankruptcy notice was not heard within the seven days for compliance specified in the bankruptcy notice, and the registrar did not extend the time for compliance as required by r 95(2), but the parties are agreed that on the authority of *Re Natarajan a/l Kuppusamy; ex p Co-operative Central Bank Ltd (In receivership)* [1992] 2 MLJ 468, the time for compliance with the bankruptcy notice was deemed to have been extended until the application had been heard and determined. That is a proposition with which I agree.

The application to set aside the bankruptcy notice was not heard and determined until 19 August 1997 on which date it was withdrawn by the judgment debtor. Both counsels agreed that as the judgment debtor had not complied with the bankruptcy notice, she had committed an act of bankruptcy and that the bankruptcy petition should have stated that the act of bankruptcy relied upon to found the petition had occurred on 19 August 1997 and not 27 November 1996.

There had quite obviously been an error in stating in the bankruptcy petition the date upon which the act of bankruptcy occurred but it is the submission of counsel for the judgment debtor that the misstatement of the date of the act of bankruptcy is fatal and on the authority of *Re Fadzil bin Othman; ex p Malayan Banking Bhd* [1994] 2 MLJ 474, a case in which it was held that the error in incorrectly stating the date of the act of bankruptcy by even a single day was sufficient to set aside a bankruptcy petition, this petition should be set aside. It is also counsel's submission that the mistake in stating the incorrect date of the act of bankruptcy cannot be cured or remedied by an amendment to the petition because a court will not allow a bankruptcy petition to be amended to rely on an act of bankruptcy in respect of which more than six months had elapsed between the date of its occurrence and the date the amendment is sought. In support counsel relied on the case of *Re A Debtor (No 31 of 1969); ex p the Debtor v Triggs Turner & Co* [1970] 1 All ER 920.

Mr James Devadason, learned counsel for the judgment creditor submitted that the mistake in not correctly stating in the petition the date on which the act of bankruptcy occurred is an irregularity which by virtue of the saving provisions of s 131 of the Act, will not invalidate these proceedings and thus urged the court to allow an amendment to be made to the petition to correctly state the date of the act of bankruptcy. If such an amendment is made, the bankruptcy petition suffers from no defect since it was presented well within six months of 19 August 1997.

To my mind, the real issues that arise for determination are: (a) whether the mistake in incorrectly stating the date on which the act of bankruptcy occurred amounts to an irregularity which can be cured so that the petition is saved by virtue of s 131 of the Act; and (b) if the mistake is to be regarded

as an irregularity, whether the petition may be amended to correctly state the date on which the act of bankruptcy occurred. A

On the first issue, it is my finding that the mistake has an irregularity only which did not go to the substance of the complaint in this petition. The error in stating the date on which the act of bankruptcy took place did not in any way detract from the fact that the judgment debtor had failed to comply with the bankruptcy notice within the time allowed by law. Being an irregularity only, such mistake would in my view come within the contemplation of s 131 of the Act. It is also my view that the irregularity had occasioned no substantial injustice to the judgment debtor. There is no dispute, doubt or confusion between the parties as to the date when the act of bankruptcy occurred, and why it occurred on 19 August 1997 and not 27 November 1996, as stated in the petition. The judgment debtor had also availed herself to the right to challenge the bankruptcy notice and in mounting this present challenge has not complained of any injustice or prejudice which she suffered as a result of the irregularity. It follows from what I have stated above that I do not find the mistake to be fatal to this petition and respectfully decline to follow the decision in the case of *Re Fadzil bin Othman; ex p Malayan Banking Bhd* relied upon by counsel for the judgment debtor as that case did not consider the application of s 131 of the Act. B C D

Regarding the second issue on the question of amendment, s 93(3) of the Act reads: E

> The court may at any time amend any written process or proceeding upon such terms, if any, as it thinks fit to impose.

On the principles a court should have regard to when considering whether to amend a bankruptcy petition, counsel for the judgment debtor has referred me to *McDonald, Henry & Meek Australian Bankruptcy Law & Practice* and to pp 880 and 881 thereof where examples of cases in which amendments have been allowed and disallowed are set out. Learned counsel for the judgment creditor has likewise referred me to *William's Law and Practice in Bankruptcy* (18th Ed) and to pp 551 to 553 thereof. Without having to repeat what is stated in those publications, it would not be an unfair summary of one of the principles stated there and which is relevant to the determination of this appeal, if I said that a court would more readily allow an amendment which seeks to cure a defect or irregularity which is one of form or merely technical in nature but not if it is one of substance. F G

In support of his contention that the amendment sought in this case must be regarded as more technical than anything else, counsel for the judgment creditor referred me to two cases in which the court had regarded an error made concerning the date of bankruptcy to be more technical in nature than one of substance and curable by amendment. In *Re Dunhill; ex p Dunhill* (1894) 2 QBD 234, the bankruptcy petition simply stated that the debtor had failed to comply with a bankruptcy notice served upon him on a day named without stating the date of the act of bankruptcy. On appeal from the decision of the registrar making a receiving order against the debtor, it was held by Vaughan Williams J that the bankruptcy petition H I

ought to have stated the date but that the defect in not so stating the date of the act of bankruptcy was not a ground for setting aside the receiving order but ought to have been amended at the hearing of the petition, and since the Registrar did not amend it, the appellate court did so.

In *Re Lorrimar; ex p Constable* [1890] 62 LT 943 and reported on p 35 of 4(2) *The Digest* (2nd Reissue, 1991), a bankruptcy petition was dismissed by the registrar on the ground that the act of bankruptcy was not sufficiently alleged upon the face of the petition because what was alleged was the 'non-compliance with a bankruptcy notice issued out of this court on 13 May 1890, and duly served upon (debtor) on the 13 day of the month.' On appeal it was held that the objection was a purely technical one, which the registrar ought to have dealt with by amendment, and the petition must go back to the registrar with a direction to amend and to hear the case on its merits.

The proposed amendment to this petition would involve changing the date on which the act of bankruptcy occurred from 27 November 1996 to 19 August 1997. Would such an amendment be one that goes to the substance of the petition? I have already found that the mistake in incorrectly stating the date on which the act of bankruptcy occurred in this petition was an irregularity which did not go to the substance of the petition and have given my reasons for saying so. It must follow from that finding that an amendment necessitated by such mistake will not be one that affects the substance of the petition, namely, that the judgment debtor has failed to comply with the bankruptcy notice within the time allowed in law.

The next question that arises for determination is whether an amendment can be made to the petition as more than six months have now passed since the date of the act of bankruptcy.? Counsel for the judgment debtor referred to the Case of *Re a Debtor (No 31 of 1969), ex p the Debtor v Triggs Turner & Co* as authority for the proposition that in such a situation you cannot do so. That was a case in which Wadhams (HNC) Ltd ('W') as well as Triggs Turner & Co ('Triggs') each served separate bankruptcy notices on the debtor. The time for complying with W's bankruptcy notice expired on 20 May 1969. The time for complying with Trigg's bankruptcy notice expired at the end of the day on 8 July 1969. W presented a bankruptcy petition against the debtor on 8 July 1969 and the act of bankruptcy relied on was the debtor's failure to comply before 21 May 1969 with W's bankruptcy notice. An application to amend the petition was granted so that not only was Triggs substituted for W as the petitioning creditors but also substituting, as the act of bankruptcy alleged, failure to comply with Trigg's bankruptcy notice, in place of the failure to comply with W's notice. The petition as so amended was, however, invalid because the time for complying with the Triggs notice did not expire until the end of the day on 8 July 1969 by which time W's petition had already been presented. When the debtor's appeal against the order of substitution came up, *Triggs* applied for the petition to be further amended under s 109(3) of the Bankruptcy Act 1914 (which is the English equivalent of s 93(3) of our Bankruptcy Act 1967) by restoring the act of bankruptcy originally relied on, ie the failure to comply with W's bankruptcy notice before 21 May

1969. At the date of the hearing of the application, more than three months had elapsed since the occurrence of that act of bankruptcy. On those facts, it was held that an amendment would not be allowed which would introduce an act of bankruptcy more than three months after its occurrence, whether the act had at some time previously appeared on the petition or not. A

As I read it, that case is authority for the proposition what where a petition is sought to be amended in such a manner as to introduce an act of bankruptcy which had occurred more than three months before the date of amendment it would not be allowed, the rationale being that as the Bankruptcy Act itself does not contemplate that an act of bankruptcy shall be available as a basis for a petition more than three months after it has occurred, the policy behind the Act would operate to prevent an amendment which introduces 'de novo' an act of bankruptcy which by the date of the amendment was no longer available to found a petition. B C

Applying what is stated there to the facts of our case, can it be said that by the proposed amendment the judgment creditor seeks to introduce a new act of bankruptcy to found this petition? If it does not then the question of whether the act of bankruptcy occurred more than six months before the date of amendment becomes irrelevant and the decision in *Triggs Turner* will have no application. In my judgment, the proposed amendment does not seek to introduce a new act of bankruptcy into this petition; the act of bankruptcy relied upon remains the same ie non-compliance with the bankruptcy notice served on 19 November 1996. What the judgment creditor seeks to do by the contemplated amendment is to correct the date on which the act of bankruptcy occurred from 27 November 1996 to 19 August 1997. Accordingly, the amendment is made merely to correctly state the date on which that event happened and to that extent must be regarded as a technical one which does not go to the substance of the petition. I accordingly hold that the judgment creditor would not be prevented from amending its bankruptcy petition. The next question is whether the amendment should be made by the SAR or here. After dismissing the judgment debtor's application to set aside the bankruptcy petition, the SAR adjourned the hearing of the bankruptcy petition on its merits; it therefore remains outstanding for hearing before her. In these circumstances any amendments should be made by the SAR. D E F G

For all the reasons given above, I dismiss this appeal with cost. I also direct that before the bankruptcy petition is heard, it be amended by the SAR to correctly state the date on which the act of bankruptcy occured, ie 19 August 1997.

Appeal dismissed with costs. H

Reported by Jafisah Jaafar

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